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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia
Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS FOR THE APPENDIX

United States Court of Appeal's

Orders, Opinions or Judgments
are located in the Appendix as follows:

October 9, 2007 JUDGMENT w/o Memo..... 1

September 24, 2007 ORDER..... 3

United States District Court's

Orders, Opinions or Judgments
are located in the Appendix as follows:

September 19, 2006 ORDER..... 4

September 20, 2006 Amended Memorandum..... 5

October 23rd, 2006 Memorandum Opinion/Order. 16

November 9th, 2006 ORDER..... 21

United States Court of Appeals
For The District of Columbia Circuit

No. 06-7171 September Term, 2007
06cv00022
Filed On: October 9, 2007

Kenneth W. Johnson,
Appellant

v.

Jesse Gadson, et al.,
Appellees

Consolidated with 06-7204

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. The district court correctly concluded that appellant's complaint failed to state a claim upon which relief could be granted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
For The District of Columbia Circuit

No. 06-7171 September Term, 2007
06cv00022
Filed On: September 24, 2007

[1068846]
Kenneth W. Johnson,
Appellant

v.

Jesse Gadson, et al.,
Appellees

Consolidated with 06-7204

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for oral argument, the response thereto, and the reply, it is

ORDERED that the motion be denied. Oral argument will not assist the court in this case. Accordingly, the court will dispose of the appeal without oral argument on the basis of the record and the presentations in the briefs. See Fed. R. App. P 34(a)(2); D.C. Cir. Rule 34(j).

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.**
	)	**06-22 (RWR)**
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motions to dismiss be, and hereby are, GRANTED. The complaint is DISMISSED. It is further

ORDERED that plaintiff's motion to admit videotape evidence and defendant Lee's motion to strike the motion be, and hereby are, DENIED as moot.

This is a final, appealable Order.

SIGNED this 19th day of September, 2006

/s/

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 06-22 (RWR)**
	)	
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	
	)	

AMENDED MEMORANDUM OPINION

Pro se plaintiff Kenneth W. Johnson has filed an action against several individuals and a law firm, alleging violation of his civil rights under 42 U.S.C. §§ 1981 and 1983, legal malpractice, and intentional infliction of emotional distress. Each defendant[1] has moved to dismiss the complaint for failure to state a claim.[2] Because Johnson does not

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[1] The complaint was dismissed as to defendants Stacy Lewis and Robert Mance because those defendants were not served with a summons and complaint.

[2] Defendants also argue that issue preclusion and the statute of limitations should bar this action. These contentions are without merit. Issue preclusion does not apply here because the events giving rise to the claims against the moving defendants have never before been litigated. The three-year D.C. statute of limitations on personal injury claims, D.C. Code § 12-301(8), which applies here by operation of a Supreme Court decision, Owens v. Okure, 488 U.S. 235, 249-

state a claim under the civil rights statutes, those claims will be dismissed, and supplemental jurisdiction of the state law claims will be declined under 28 U.S.C. § 1367(c)(3).

BACKGROUND

Johnson, a man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European" (Am. Compl. at 6), complains because none of the defendants, all attorneys, agreed to represent him in his pursuit of legal remedies relating to matters that occurred in 1997 when he was arrested, tried, and acquitted in the Superior Court for the District of Columbia.[3] On the basis of these refusals, he alleges race discrimination, legal malpractice, and intentional infliction of emotional distress.

According to Johnson, he approached attorney Jesse Gadson in 2002 about filing a claim

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50 (1989), does not bar this action because Johnson filed this action on January 9, 2006, complaining of events that occurred no earlier than January 15, 2003. See also, Carter v. District of Columbia, 14 F.Supp. 2d 97, 102 (D.D.C. 1998) (stating that plaintiffs in this court "have the right to bring a Section 1981 or a Section 1983 claim at any time within three years of the alleged discrimination").

[3] The complaint itself, exclusive of the five volumes of attached exhibits, is 104 pages long, argumentative, and far from the "short and plain statement of a claim," or "simple, concise and direct" averment that Fed.R.Civ.P. 8(a)(2) and (e) requires.

for post-judgment relief, but Gadson declined and directed Johnson to the public law section of the Library of Congress. (Am. Compl. at 40-41.) Johnson visited Gadson again sometime shortly before January 15, 2003, because Gadson had given him more time and more valuable information than had any other attorney Johnson had contacted. (Id. at 41.) On January 15, 2003, Gadson entered into a contract with Johnson for the limited purpose of "investigat[ing] the possibility of filing a law suit against the District of Columbia government." (Id. at 40, 50 (quoting agreement between Gadson and Johnson).) After conducting the agreed-upon investigation, and viewing additional materials at Johnson's request, Gadson again declined to represent Johnson, expressly because Gadson felt he did not have the experience necessary for the case.4 (Id. at 44.)[4]

According to the amended complaint, in September 2003, Johnson asked Tony Lee, an attorney and partner in the law firm McGuireWoods, LLP,[5] to "provide legal counsel on filing a motion to set aside the prior judgment in Johnson v. District of Columbia . . . C.A. 3837-98 before the Superior Court of the District of

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[4] Johnson, pro se, filed an action against the District of Columbia on June 4, 2003, which was dismissed on a motion to dismiss that was filed in late July 2003, because the claims were time barred. See Johnson v. District of Columbia, Civil Action 03-1218 (CKK) (D.D.C. Oct. 14, 2003).

[5] McGuireWoods is also a defendant, but without stating so, Johnson alleges McGuireWoods' liability by only through the acts of Lee. (See Am. Compl. at 68-78.)

Columbia pursuant to [R]ule 60(b). . . . And asked Tony Lee to have the July 15, 1998 judgment vacated. He refused[]!" (Am. Compl. at 53.) The amended complaint recounts some of the advice Lee gave Johnson and his conclusion that Lee could not help Johnson in his efforts. (Id. at 53-54.) The facts Johnson alleges suggest that Lee made a contract with Johnson and, as agreed, provided legal counsel to him.

Johnson alleges that he spoke to attorney Elbert Shore on April 15, 2004, about Shore entering an appearances in an action Johnson had filed pro se three days earlier captioned Johnson v. Mance, asserting claims relating to events occurring in 1997 and another event occurring in 2004.[6] (Am. Compl. at 66.) Johnson alleges that he paid Shore a $75.00 consultation fee and presented Shore with the facts underlying the Mance action, that Shore asked and was told about Johnson's mixed racial ancestry, and that Shore refused to represent Johnson in the matter. (Id.)

Then, sometime in June 2004, Johnson attempted to engage the legal services of Harold N. Harmon and Robert F. Condon. Johnson "offered his [pending *pro se*] lawsuit against Robert Mance" to Harmon and Condon and told them of the facts

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[6] On August 6, 2004, the complaint was dismissed because the claims pled either failed to state a claim upon which relief could be granted or were barred by the statute of limitations. See Mem., Johnson v. Mance, Civil Action No. 04-591 (JR) (D.D.C. Aug. 5, 2004).

in the case. (Id. at 62.) A motion to dismiss in that case had been filed on June 7, 2006. Harmon and Condon later sent Johnson a retainer agreement, but before the agreement reached Johnson, the case was dismissed. (Id.) After Johnson informed Harmon and Condon that the case had been dismissed, they responded in a letter: "Please be advised that we will not be able to represent you in your case that was dismissed by Judge Robertson in the U.S. District Court or in your current Motion for Summary Reversal filed in the U.S. Court of Appeals for the District of Columbia." (Id.)

Johnson alleges that the defendants' refusals were racially discriminatory and deprived him of his civil rights in violation of 42 U.S.C. §§ 1981 and 1983. He also alleges that these same refusals constituted legal malpractice and the intentional infliction of emotional distress, in violation of state common law.

DISCUSSION

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). A "complaint should not be dismissed unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. . . . To that end, the complaint is construed liberally

in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged. . . . However, the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citations omitted).

I. THE FEDERAL CIVIL RIGHTS CLAIMS

A. Claim for discrimination under 42 U.S.C. § 1981

Johnson alleges that all defendants violated § 1981 when they "refused to either make or enforce a contract with Johnson, because Johnson is a predominately Caucasian U.S. Citizen, who has scant physical evidence of any African blood or ancestry . . . ." (Am. Compl. at 6.) Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." Johnson claims that the black defendants — who are not identified — have discriminated against him because he appears white. (Am. Compl. at 6.) He also alleges that white defendants — who are not identified — have discriminated against him because although he appears white, they knew of his black ancestry. (Id.) The only defendant Johnson alleges knew of his black ancestry is Elbert Shore. (Id. at 66.)

Johnson infers race-based discrimination by all the defendants, but for each defendant, that inference enjoys no support from the facts Johnson pleads. First, Johnson alleges that he was perceived as a white citizen by all defendants except Shore, who knew of his black ancestry. (Am. Compl. at 6, 66.) White plaintiffs certainly may sue under § 1981. However, because § 1981 entitles all persons to the same contracting rights as are "enjoyed by white citizens," Johnson's allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981. See MacInstosh v. Building Owners & Managers Ass'n Intern., 355 F. Supp. 2d 223, 226 (D.D.C. 2005) (discussing how although a § 1981 plaintiff need not be a person of color, the conduct complained of must involve some racially motivated differentiation (citing Glymph v. District of Columbia, 211 F. Supp. 2d 152, 154 (D.D.C. 2002))).

Second, other facts Johnson alleges do not support an inference of race-based discrimination as to any of the defendants, including Shore. Johnson pleads facts that establish that each defendant met with Johnson, agreed to evaluate his case and then, only after evaluating the merits of Johnson's case, declined to provide representation. In the case of each defendant, the facts Johnson pleads demonstrate that each defendant was either willing to (Harmon & Condon), or did (Gadson, Lee, Shore), make a contract with

Johnson, some only for the limited purpose of evaluating or providing legal advice on the efficacy of pursuing a claim.[7] In the case of each defendant, the facts Johnson alleges reflect that the representation was declined for professional (Gadson) or legal (Lee, Shore, Harmon & Condon) reasons. Even with respect to Shore, Johnson's allegations do not support an inference of race based discrimination in contracting. Shore agreed to provide a legal consultation and did so. Then, after learning of the facts of the case, he declined to represent Johnson in the already filed Johnson v. Mance action.

In short, Johnson's factual allegations do not support an inference of race-based discrimination. The only suggestions of race-based conduct in the complaint are the sweeping and factually unsupported conclusions asserted by Johnson. Such conclusions, devoid of factual support, are not credited on a motion to dismiss. Kowal, 16 F.3d at 1276 (noting that a court is not required to "accept legal conclusions cast in the form of factual allegations"). Accordingly, the § 1981 claim as to each defendant will be dismissed for failure to state

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[7] Johnson appears to harbor the belief that if he pays an attorney for legal advice and then wants to pursue a course of action against legal advice, that he can command an attorney to represent him. This is not necessarily so. An attorney is both a professional and an officer of the court who is not only entitled, but also obligated, to use his professional legal judgment in accord with his ethical responsibilities to decline to make arguments or representations that are not supported in either fact or law.

a claim upon which relief may be granted. Fed. R. Civ. P. 2(b)(6).

B. Claim for discrimination under 42 U.S.C. § 1983

Johnson alleges that the defendants' refusals to represent him in his pursuit of legal remedies violated § 1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." "To state a claim under section 1983, a plaintiff must allege both (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the defendant acted 'under color of' the law of a state, territory or the District of Columbia." Hoai v. Vo, 935 F.2d 308, 312 (D.C. Cir. 1991) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).

First, as was true with Johnson's § 1981 claims, Johnson does not make factual allegations that reflect that he was deprived of any right secured by federal law. Second, Johnson does not allege that the defendants were state officials,[8] or

[8] An attorney licensed to practice law is not acting under color of law by dint of his membership in the bar and status as an

that they conspired with state officials or willfully engaged in joint activity with a state or its agents in their refusal to represent Johnson. See id. Accordingly, Johnson's allegations do not state a claim for which relief may be granted under 42 U.S.C. § 1983 and that claim will be dismissed as to each defendant.

II. THE STATE COMMON LAW CLAIMS

If "the district court has dismissed all claims over which it has original jurisdiction," the court may decline to exercise supplemental jurisdiction over remaining state law claims.[9] 28 U.S.C. § 1367(c)(3). Accordingly, supplemental jurisdiction over Johnson's state common law claims will be declined and those claims will be dismissed for lack of jurisdiction.

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officer of the court. See Polk v. Dodson, 454 U.S. 312, 318 (1981); Van Daele v. Vinci, 294 F. Supp. 71, 74 (N.D. Ill. 1968)("Merely acting under a state license is not state action within the context of the civil rights acts."); Sullivan v. Stein, No. Civ. 3:03 CV 1203 (MRK), 2004 WL 1179351, *11 (D. Conn. May 21,2004) ("It is well-settled . . . that private attorneys do not act under color of state law and are not state actors simply by virtue of their state-issued licenses to practice law.").

[9] Johnson asserts diversity jurisdiction. (See Compl. at 3; Am. Compl. at 3.) However, he fails to plead complete diversity of citizenship, and the face of the complaint (and of the amended complaint) reflect an absence of complete diversity. Both Johnson and defendant Shore have addresses in Maryland and Maryland citizenship has not been disputed. Thus, there is no diversity jurisdiction over this action under 28 U.S.C. § 1332(a).

CONCLUSION

Because Johnson's factual allegations do not state a claim under the civil rights statutes, those claims will be dismissed. Because supplemental jurisdiction of the state law claims will be declined under 28 U.S.C. § 1367(c)(3), those claims will be dismissed. Because the complaint will be dismissed, the two pending motions relating to admission of evidence will be denied as moot. A final, appealable Order accompanies this memorandum Opinion.

SIGNED this 20th day of September, 2006.

/s/
RICHARD W. ROBERTS
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 06-22 (RWR)**
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Kenneth W. Johnson has filed motions to reconsider and vacate an order dismissing his complaint. He has also filed a motion to admit evidence of his current and intended future domicile related to the issue of diversity jurisdiction. Because Johnson does not identify any reason with legal merit to reconsider or vacate the order, and because the offered evidence would not remedy the flaw in diversity jurisdiction, his motions will be denied.

BACKGROUND

Johnson filed a complaint asserting federal question, supplemental and diversity jurisdiction, and alleging violations of his federal civil rights under 42 U.S.C. §§ 1981 and 1983, legal malpractice and intentional infliction of emotional

distress. The federal civil rights claims were dismissed for failure to state a claim upon which relief could be granted. The common law claims were dismissed because the complaint did not establish diversity jurisdiction and supplemental jurisdiction was declined. See Memorandum Opinion & Order, Sept. 19, 2006. Johnson has moved for relief from the dismissal under Fed. R. Civ. P. 59(e) and 60(b)(2), and to admit evidence of his current and intended future domicile.

DISCUSSION

I. MOTIONS FOR RECONSIDERATION AND TO ADMIT DOMICILE EVIDENCE

A motion for reconsideration under Fed. R. Civ. P. 59 is not intended to provide a vehicle to reargue facts already presented. Messina v. Krakower, 439 F.3d 755, 759 (D.C. Cir. 2006) (affirming denial of Rule 59(e) motion where plaintiff did nothing more than rely on the same arguments originally made). Rather, such a motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Id. at 758 (quotation marks and citation omitted).

Johnson contends that his complaint did not fail to state a claim upon which relief may be granted. (Pl.'s Mot. for Reconsideration at 1.) His argument, however, focuses primarily on his legal malpractice allegations, about which no finding

was made with respect to the sufficiency of the pleading. (Id. at 2-5.) Johnson has not identified a basis for reconsidering the decision as to the federal civil rights claims. He has, at the most, reargued facts already presented.

Johnson also argues in his motion for reconsideration that diversity jurisdiction exists. (Id. at 1.) In support of that argument, and attached to a motion to admit evidence, he filed an affidavit and documents demonstrating that he lives in Maryland and intends to remain domiciled in Maryland, and that at least one of the defendants is a Virginia citizen. Johnson's arguments and evidence do not meet the test of diversity jurisdiction, as diversity jurisdiction cannot be established on the basis of the citizenship of the plaintiff and one of multiple defendants. Diversity jurisdiction requires complete diversity between adversaries at the time the suit is filed, such that no defendant may be a citizen of the state of which any plaintiff is a citizen. [1] See Saadeh v. Farouki, 107 F.3d 52, 54-55 (D.C. Cir. 1997) (stating that "'federal diversity jurisdiction is lacking if there are any litigants from the same state on opposing sides.'" (citing Prakash v. American Univ., 727 F.2d 1174, 1178 n.25 (D.C. Cir. 1984)).

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[1] Johnson's point that defendant Elbert Shore, whose address on the face of the complaint was listed as Maryland, was not involved in the series of events giving rise to the asserted cause of action until April 15, 2004, is irrelevant. (Pl.'s Mot.for reconsideration at 13-14.)

MOTION TO VACATE

A motion for relief from a judgment or order may be based upon newly discovered evidence. Fed. R. Civ. P. 60(b)(2). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. Johnson argues that newly discovered evidence relating to his legal malpractice claims previously brought in Superior Court warrants granting his Rule 60(b)(2) motion. (Pl.'s Mot. to Vacate at 1.) What Johnson erroneously characterizes as newly discovered evidence is a memorandum opinion and judgment of the District of Columbia Court of Appeals issued September 28, 2006, affirming the District of Columbia Superior Court's orders denying Johnson's motions under Super. Ct. Civ. R. 60(b) in which Johnson asserted that his adversary had committed fraud upon the court. (See Mem. Op. & J., Johnson v. District of Columbia, Nos. 04-CV-115 and 04-CV-442 (D.C. Ct. App. Sept. 28, 2006) at 1 ("The trial court found no merit to the claims of fraud, and neither do we. We accordingly affirm.").) The decision of the appeals court does not constitute newly discovered evidence relevant to the federal civil rights claims, or any other claims, that Johnson asserted in his complaint in this case.

CONCLUSION AND ORDER

Because Johnson has not identified a sound legal basis for either reconsidering or vacating the order dismissing his complaint, and because the evidence he offered will not alter the conclusion that diversity jurisdiction was not established, Johnson's motions will be denied. Accordingly, it is hereby ORDERED that Johnson's motion for reconsideration of the September 19, 2006 order be, and hereby is, DENIED. It is further ORDERED that Johnson's motion to vacate the September 19, 2006 order be, and hereby is, DENIED. It is further ORDERED that Johnson's motion to admit evidence be, and hereby is, DENIED.

SIGNED this 23rd day of October, 2006.

/s/

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
Plaintiff,	)	
v.	)	**Civil Action No.**
	)	**06-22 (RWR)**
STACEY LEWIS et al.,	)	
Defendants.	)	
	)	

ORDER

Plaintiff Kenneth W. Johnson has filed a motion seeking reconsideration of an order dated October 23, 2006 that denied Johnson's motion to vacate an order dismissing his complaint. Johnson's motion attempts to reargue facts and legal arguments already presented, but a motion for reconsideration under Fed. R. Civ. P. 59 is not a vehicle to reargue facts and argument already presented. See Messina v. Krakower, 439 F.3d 755, 759 (D.C. Cir. 2006) (affirming denial of Rule 59(e) motion where plaintiff did nothing more than rely on the same arguments originally made). Accordingly, it is hereby ORDERED that Johnson's motion for reconsideration of the October 23, 2006 order be, and hereby is, DENIED.

SIGNED this 9th day of November, 2006.

/s/
RICHARD W. ROBERTS
United States District Judge